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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM 1939

EUGENE KOSTER,

Petitioner,

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

MILTON POLLACK,
Attorney for Petitioner.

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against
(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States and to the Honorable the Chief Justice and the Justices thereof:

The petition of plaintiff, Eugene Koster, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows to this Court:

A

Jurisdiction.

The jurisdiction of the District Court rests on diversity of citizenship, § 24 of the Judicial Code, 28 U. S. C. § 41. The jurisdiction of this Court rests upon § 240 of the Judicial Code, 28 U. S. C. § 347. The Circuit Court filed its judgment of affirmance on February 4, 1946 (R. 49-50). On February 21, 1946, petitioner moved for a rehearing (R. 55) which the Circuit Court, upon consideration thereof, denied on March 18, 1946 (R. 68-69).

B

Opinions Below

The opinion of the District Court for Eastern New York (R. 30), by Abruzzo, D. J., is reported 64 F. Supp. 595.

The opinion of the Circuit Court (R. 42), by Swan and Chase, C. JJ., is reported 153 F. 2d 888. Clark, C.J., dissented in a separate opinion (153 F. 2d 891).

C

Summary Statement of the Matter Involved

Petitioner asks this Court to review the Circuit Court's affirmance (R. 49-50) of the final order of the District Court for Eastern New York dismissing the action on the ground that it was brought in a *forum non conveniens* (R. 37). A review is also sought of the Circuit Court's denial of rehearing (R. 68-69).

1. Character of the action

This is a derivative suit for a money judgment brought by petitioner as plaintiff on behalf and for the benefit of defendant-respondent (American) Lumbermens Mutual Casualty Company ("Lumbermens" hereafter) (R. 4).

Lumbermens is a mutual insurance company organized in Illinois, licensed to do and doing business in New York (R. 20). Petitioner, a citizen of New York and a resident of its Eastern District (R. 3), has been since May, 1941, and now is a member and policy holder of Lumbermens (R. 4).

Lumbermens is only a formal or nominal defendant. The real defendants are James S. Kemper, the President, Manager and Chairman of the Board of Lumbermens (R. 4), and James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), an Illinois corporation (R. 3-4) controlled by Kemper and his family (R. 6-7).

The complaint (R. 3) charges Kemper with the waste and diversion of Lumbermens' assets. Kemper caused Lumbermens to pay him excessive salary and other compensation for 1942 (first cause of action); to pay unwarranted commissions and fees to Kemper & Co. (second cause of action); and to sell to him, and to persons allied with him, substantial amounts of securities at prices well below their value (third and fourth causes of action).

The complaint prays that Kemper and Kemper & Co. be directed to account to Lumbermens for its damages and for their profits (R. 14).

2. Lumbermens' motion to dismiss

Lumbermens, for whose benefit this action is brought, moved to dismiss it on two grounds: (1) *forum non conveniens;* and (2) absence of an indispensable party defendant (R. 18). The second ground of motion was overruled by the Circuit Court (R. 43) and will not again be referred to herein.

Lumbermens' motion did not question federal jurisdiction or the propriety of venue. Diversity of citizenship and a $3,000 amount in controversy are alleged (R. 3-4) and undisputed. The venue, laid in the district of petitioner's residence (R. 3), complies with § 51 of the Judicial Code, 28 U. S. C. § 112.

But Lumbermens contended that the District Court, in the exercise of its discretion, should decline jurisdiction because this suit involves its internal affairs which can more conveniently be adjudicated in Illinois, the state of its incorporation, than in New York (R. 19-26). In support of the plea of inconvenience Lumbermens stated that its head office is in Chicago; five of its seven directors, most of its officers and more than one-third of its employees reside in Illinois; its general business records are kept there; most of the witnesses and records necessary for the trial would have to be brought from Chicago to New York with consequent expense, loss of time and inconvenience

(R. 32-33, 46). By contrast, it was contended that petitioner's proportionate individual interest in the recovery would be negligible and that trial of the action in Illinois would put him to no substantial inconvenience (R. 20, 23-25, 47).

Lumbermens further argued that the action involves difficult problems of Illinois law which could more efficiently be determined by the courts of that state, including the question whether petitioner is barred from access to the courts by a provision of the Illinois Insurance Code allegedly requiring him to address his complaint to the Director of Insurance of Illinois (R. 25, 26, 35).

3. The decisions below.

(a) *The District Court's decision* (R. 30): The District Court held that the action involves the internal affairs of Lumbermens and that the difficulty of bringing witnesses and records from Chicago to New York and the necessity of deciding difficult questions of Illinois law make Illinois the most appropriate forum.

(b) *The Circuit Court's majority decision* (R. 42): The Circuit Court, in affirming this decision, held:

1. This action does not involve the internal affairs of Lumbermens since it seeks only a money judgment (referring to *Williams* v. *Green Bay & Western R. Co.*, 66 S. Ct. 284 [1946]) (R. 44).

2. Had this action been brought in the New York State courts, jurisdiction would be mandatory (R. 44-45, n.2).

3. Under the law of Illinois, petitioner is entitled to maintain this action and is not relegated to his remedy before the Illinois Director of Insurance (R. 45-46).

4. Nevertheless, the action must be dismissed because the District Court, without abuse of discretion, found the suit "so vexatious or oppressive that 'con-

siderations of convenience, efficiency and justice point to the courts of the state of the domicile as appropriate tribunals'" (referring to *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 131, and to the *Williams* case, *supra*) (R. 47).

(c) *Judge Clark's dissent* (R. 47): Judge Clark thought that *Williams* v. *Green Bay & Western R. Co.*, *supra*, 66 S. Ct. 284, restricted rather than extended the scope of the *forum non conveniens* rule. That rule, theretofore limited to cases involving the internal affairs of foreign corporations and to certain admiralty controversies, should not be extended to actions seeking merely a money judgment. The mere inconvenience of the chosen forum to the defendant and to witnesses is not enough to render the suit vexatious or oppressive.

D

The Questions Presented to This Court

The precise question before this Court is:

> Has the District Court, in a diversity case, discretion to relegate the action to another forum for reasons of "convenience, efficiency and justice", where the suit seeks only a money judgment, is brought in the district of the plaintiff's residence and where, upon identical facts, the jurisdiction of the state courts would be mandatory?

The answer depends on a number of subsidiary questions:

> 1. Is the plaintiff's statutory right in a diversity case to lay the venue, in a money action, in the district of his residence subject to the limitation that the choice of forum must not be vexatious or oppressive?

Assuming that the statutory choice of forum is subject to such a limitation, the question arises:

2. Is inconvenience to the defendant and to witnesses a sufficient ground to render the statutory choice of forum "vexatious or oppressive"?

Assuming an affirmative answer, the last question is:

3. Has a district court, in a diversity case, discretion to decline jurisdiction where, upon identical facts, the jurisdiction of the state courts would be mandatory?

This question was expressly reserved in *Williams* v. *Green Bay & Western R. Co., supra.* It is now squarely presented since the Circuit Court has held that the New York courts in similar cases do not decline jurisdiction (R. 44-45, n.2).

E

Grounds for Granting the Writ of Certiorari

1. The decision below constitutes a far-reaching innovation in the law of federal jurisdiction and venue. Concededly, the action does not involve the internal affairs of a foreign corporation, but seeks only a money judgment (R. 44). If the Circuit Court's decision were permitted to stand, a district court might, for considerations of "convenience, efficiency and justice", decline jurisdiction even of a simple breach of contract action, on the theory that it is "vexatious or oppressive".

Such has never been the law. We propose to show that the Circuit Court's decision is in conflict with *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, at 54 (1941); *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, at 519, 521 (1934, per Cardozo, J.); and *Williams* v. *Green Bay & Western R. Co., supra*, 66 S. Ct. 284.

2. The serious doubts surrounding the true import of *Williams* v. *Green Bay & Western R. Co., supra,* are reflected by the Circuit Court's decision herein and in *Gilbert* v. *Gulf Oil Co.*, 153 F. 2d 883 (C. C. A. 2, 1946), cert. granted May 20, 1946. In the latter case, Judges Clark and Frank held that the *Williams* case limits the doctrine of *forum non conveniens* to cases involving internal corporate affairs (153 F. 2d, at 885, 886). Extension of the doctrine beyond these confines, they thought, would cut "so deeply into traditional notions about the jurisdiction of the federal courts" as to make it "difficult to believe that the Supreme Court meant to go so far" (p. 886). But Judges Swan and Chase (in the case at bar) and Judge A. N. Hand (dissenting in the *Gilbert* case) read the *Williams* case as requiring that very extension of the doctrine.

Judges Clark and Frank further held that, even if the doctrine of *forum non conveniens* were extended to cases other than those involving internal corporate affairs, a choice of forum cannot be held "vexatious or oppressive" on the mere ground of inconvenience to the defendant and to witnesses. But again Judges Swan, Chase and A. N. Hand drew different conclusions from the *Williams* case.

The conflict among the Circuit judges, the doubts surrounding the scope of the *Williams* case, and the questions relating to the mandatory or discretionary character of federal jurisdiction and venue are thus such as to call urgently for final settlement by this Court.

This Court recognized the need by granting certiorari in *Gilbert* v. *Gulf Oil Co., supra.*. The problems raised by the instant case, while related to those in the *Gilbert* case, are sufficiently different to call for review by this Court of the case at bar along with *Gilbert* v. *Gulf Oil Co., supra.*

WHEREFORE, petitioner prays that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

MILTON POLLACK,
Attorney for Petitioner.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

EUGENE KOSTER, being duly sworn, deposes and says:

That he is the petitioner herein; that he has read the within petition and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and that as to those matters he believes it to be true.

EUGENE KOSTER.

Sworn to before me this
13th day of June, 1946.

ETHEL RADIN,
Notary Public, Kings County,
Kings Co. Clk. No. 72, Reg. No. 108-R-8
N. Y. Co. Clk. No. 678, Reg. No. 212-R-8
Commission Expires March 30, 1948

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

In a diversity action for a money judgment the plaintiff has an absolute right to sue in the district of his residence.

1. The rule that federal jurisdiction and venue, once their statutory requirements are met, are mandatory goes back to *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, at 404 (1821), and has been consistently followed, *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, at 54 (1941); *Meredith* v. *Winter Haven*, 320 U. S. 228, at 234 (1943). The rule, to be sure, is subject to qualifications giving the court discretion to decline jurisdiction in favor of a more appropriate forum, *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, at 423 (1932). But the qualifications are only *"applicable to particular classes of cases"*, *Massachusetts* v. *Missouri*, 308 U. S. 1, at 19 (1939), or where "exceptional circumstances *of a stereotyped nature*" intervene, *Griffith* v. *Bank of New York*, 147 F. 2d 899, at 904 (C. C. A. 2, 1945).

The "particular classes of cases" to which the doctrine of *forum non conveniens* thus is limited include suits involving the internal affairs of foreign corporations, *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, at 131 (1933); admiralty suits among aliens, *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, *supra*, 285 U. S., at 421; and other stereotyped categories enumerated in *Meredith* v. *Winter Haven*, *supra*, 320 U. S., at 235. Only where an action falls into one of these circumscribed categories has the District Court discretion to decline jurisdiction in favor of a more convenient and efficient forum; whereas in actions not con-

forming to any of these peculiar types the general rule of mandatory jurisdiction prevails.

The present suit seeks only a money judgment. In the light of *Williams v. Green Bay & Western R. Co.*, 66 S. Ct. 284 (1946), it does not, therefore, involve the internal affairs of a foreign corporation. And the action clearly fits none of the other "particular classes of cases" in which jurisdiction is discretionary.

It would seem to follow that the District Court's jurisdiction herein was mandatory and that the District Court was without power to relegate petitioner to another forum. The Circuit Court, however, invoking the *Williams* case, *supra*, vindicated such power on the premise that the institution of this suit in New York is "vexatious or oppressive".

2. The *Williams* case, we submit, does not sustain the decision below. The *Williams* action had been dismissed by the Circuit Court as involving the internal affairs of a foreign corporation (147 F. 2d 777). But even an internal affairs suit may be dismissed only if "considerations of convenience, efficiency and justice" point to the domicile of the corporation as the more appropriate forum. This Court, therefore, in reversing the Circuit Court, relied on two separate grounds: The *Williams* suit was not an internal affairs action; and, in any event, the plaintiff's choice of the New York forum was neither vexatious nor oppressive (see the last paragraph of the opinion).

The latter ground was clearly appropriate to the decision of a case which was claimed to involve the internal affairs of a foreign corporation. But there is nothing in the *Williams* opinion to suggest that a finding of "vexatious or oppressive" would justify the dismissal of a suit not falling into any of the "particular classes of cases" to which the doctrine of *forum non conveniens* has heretofore been confined. This Court, we believe, would have used different language had it intended to extend the doctrine

of *forum non conveniens*, beyond its traditional limits, to simple actions such as one for breach of contract or for an accounting by an unfaithful fiduciary. The historical background of the rule of "vexatious and oppressive" and our venue legislation clearly forbid such extension.

3. A careful scrutiny of the authorities in this country has failed to disclose a single precedent—outside the traditional scope of the *forum non conveniens* doctrine—in which jurisdiction was declined on the ground that the selection of forum was vexatious or oppressive. Such ardent advocates of the doctrine of *forum non conveniens* as Blair (*The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1), Foster (*Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41) and Dainow (*The Inappropriate Forum*, 29 Ill. L. Rev. 867) cite not one American decision applying the rule of "vexatious or oppressive". This Court in the *Williams* case, *supra*, cites only two authorities: A Scottish decision, *Société du Gaz de Paris* v. *"Les Armateurs Francais"*, (1926) Sess. Cas. 13 (H. L.); and *Gibb, International Law of Jurisdiction* (1926), pp. 212, 213.

4. Scottish cases are not too helpful as authorities in this country. Scotland has adopted the civil law rule of *actor sequitur forum rei*—the plaintiff must sue in the forum of the defendant; *Williamson* v. *North Eastern Ry. Co.*, 11 Rettie (Sess. Cas., 4th Ser.) 596, at 598 (1884). That principle necessarily colors those Scottish decisions which apply the rule of *forum non conveniens*; see *Société du Gaz de Paris* v. *"Les Armateurs Francais"*, *supra*, (1926) Sess. Cas., at 21. The rule *actor sequitur forum rei* fits ill into our common law system of jurisprudence which recognizes "the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him"; *Netograph Mfg. Co.* v. *Scrughan*, 197

N. Y. 377, at 380 (1910). Both Scottish and English courts have emphasized, therefore, that Scottish law carries the doctrine of *forum non conveniens* much further than England; *Ewing* v. *Orr Ewing*, (1885) 10 App. Cas. 453, at 506 (H. L.); *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141, at 149.

5. More pertinent are the English authorities cited by *Gibb*. Their rule is that jurisdiction may be declined only if the plaintiff is a non-resident of England and has selected the English forum in bad faith, with the sole intent of harassing the defendant; *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141; *Egbert* v. *Short*, (1907) 2 Ch. 205; *In re Norton's Settlement*, (1908) 1 Ch. 471. The last cited case, summing up the earlier law, holds:

> "• • • in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country" (p. 479).
>
> "• • • Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing, but for the purpose of putting her husband in such a position that he would practically be compelled to settle the action on the terms of the solicitors' letter which I have already referred to.
>
> "I have gone into the matter at this length in order to make it quite clear that questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings" (p. 482).

Similarly in *Egbert* v. *Short*, *supra*, (1907) 2 Ch., at 214:

> "She (plaintiff) is not resident in England in the proper sense of the term. * * * this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled".

6. No American case has been found applying the test of "vexatious or oppressive" to a suit in a federal court (or, for that matter, in any state court). The reason is obvious: The choice of a federal forum is limited, in this country, by the statutory rules of venue. In enacting those rules, and in limiting the forum of diversity suits to the residence of the plaintiff or the defendant (§ 51 of the Judicial Code, 28 U. S. C. § 112), Congress gave effect to the very considerations which moved the English Courts to decline jurisdiction of vexatious or oppressive litigations. The fluid English rule was thus replaced by one more rigid, to be sure, but also more certain in its application. The purposes of the two systems are the same; but they are achieved by different methods. To engraft the English rule of judicial discretion on ours, which is aimed at certainty, would defeat the purposes of Congress, defy the absolute terms of the venue statute and abruptly terminate a wholesome tradition of more than 150 years.

This Court has plainly held that grounds of inconvenience or expense cannot frustrate the statutory choice of venue. In *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941), this Court construed § 6 of the Federal Employers' Liability Act under which an action "may be brought" in any one of several specified districts. This Court held that the plaintiff had an absolute choice of venue regardless of inconvenience and expense to the defendant resulting from the necessity of bringing remote witnesses into the jurisdiction:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative . . . Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York" (314 U. S., at 54).

Both the plaintiff and the defendant in the *Kepner* case were residents of Ohio; the accident had occurred there; and approximately twenty-five witnesses resided near the place of the accident who could be transported only at considerable cost to New York where Kepner had brought his suit. Nevertheless, this Court rejected the railroad's contention that the prosecution of the suit in New York would be "an unreasonable, improper and inequitable burden" upon it (314 U. S., at 48).

There is no distinction in principle between the special venue under § 6 of the Federal Employers' Liability Act and the general venue under § 51 of the Judicial Code. The Court below so recognized; *Gilbert* v. *Gulf Oil Co.*, 153 F. 2d 883, at 885 (C. C. A. 2, 1946).

It is true that an apparent exception to the plaintiff's absolute choice of venue is made in suits involving the internal affairs of a foreign corporation. But that exception is more nearly one of "substantive law—that of corporate supervision", *Gilbert* v. *Gulf Oil Co., supra*, 153 F. 2d, at 885; it cannot serve, therefore, to refute the broad *procedural* rule that even under the general venue statute the plaintiff has an absolute choice of suing in any proper district, regardless of inconvenience and cost resulting to the defendant.

We submit, therefore, that petitioner has an absolute right to maintain this suit in the Eastern District of New York, the district of his residence, and that the rule of "vexatious or oppressive" cannot be invoked to defeat his choice.

POINT II

Mere inconvenience to parties and witnesses does not render a choice of forum "vexatious or oppressive".

Assuming, *arguendo*, that an action, even though brought in the proper venue, may be dismissed as "vexatious or oppressive", we submit that the facts at bar do not justify dismissal.

1. The Court below held that the District Court had discretion to decline jurisdiction and that, unless abused, the exercise of such discretion cannot be reviewed on appeal (R. 47). However, the District Court's exercise of discretion was affected by such errors of law as necessarily destroyed its conclusiveness upon an appellate court. In rejecting jurisdiction, the District Court relied on a congeries of reasons. At least two of them were clearly erroneous. The District Court held that "the suit relates to the internal affairs of a foreign corporation" (R. 35, 37); the Circuit Court recognized that it does not (R. 44). The District Court held that petitioner's remedy was with the Director of Insurance of Illinois (R. 35); the Circuit Court ruled otherwise (R. 45-46). Since these erroneous views of the law may have seriously influenced the District Court's exercise of discretion, the appellate court is not concluded by it.

But the District Court's decision is even more fatally defective. The District Court merely held that "the convenience of witnesses and efficiency and justice" point to Illinois as the proper forum (R. 37). This would have been enough on the District Court's premise that the suit involves the internal affairs of an Illinois corporation, *Rogers v. Guaranty Trust Co., supra*, 288 U. S., at 131. But this suit is not an internal affairs action; and a finding that New York is a less "convenient" and "efficient" forum

than Illinois falls far short of one that suit in New York is "vexatious or oppressive".

The terms "vexatious or oppressive" connote conduct much harsher than the mere selection of a forum inconvenient to the defendant. They presuppose conditions in which "it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice", *In re Norton's Settlement*, *supra*, (1908) 1 Ch., at 479. Mere "questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings"; *ibid.*, at 482. Since the District Court did not find that the institution of this action in the Eastern District of New York was "vexatious or oppressive" within this meaning of the term, its exercise of discretion in declining jurisdiction is not conclusive on appeal.*

2. The present plaintiff is a resident of New York. He has brought this action in the district in which he lives, in which he became a member of respondent, and in which respondent is licensed to do business and is doing an extensive amount of business. He is represented by a lawyer whom he knows and in whom he has confidence. No suggestion is made by respondent that petitioner has brought suit in New York for any ulterior purpose, or for any reason other than that of getting justice. Nor is it intimated that it would be "very difficult or practically impossible" for respondent to get justice in New York. The forum may be inconvenient to respondent; litigation there may involve expense; but it was not selected in bad faith. It is, therefore, neither vexatious nor oppressive.

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* In the *Williams* case, *supra*, 66 S. Ct. 284 (last paragraph of the opinion) this Court enumerated various facts—such as availability of witnesses and records—as indicating "that it would not be vexatious or oppressive to entertain this suit in New York". That was obviously correct reasoning; for the choice of a forum convenient to both parties cannot be vexatious or oppressive. It does not follow conversely that the selection of a forum, merely because it is inconvenient to the defendant, is "vexatious or oppressive". One may prove that an object is not black by showing that it is white; but proof that an object is not white does not establish that it is black, for it may be gray.

3. While the *Williams* case, *supra*, 66 S. Ct. 284, does not expound the terms "vexatious or oppressive", those decisions dealing with actions burdensome to interstate commerce furnish a close and valuable analogy. Suits against interstate carriers instituted in a state of which neither the plaintiff nor the defendant was a resident, in which the defendant was not transacting business, and in which the wrong complained of had not occurred, have been dismissed on the ground that the selection of the forum imposed an undue burden on interstate commerce; *Davis* v. *Farmers' Co-Op. Equity Co.*, 262 U. S. 312 (1923); *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101 (1924). But otherwise where—as in the present case—the plaintiff was a resident of the state in which he sued and the defendant transacted some measure of business there. Residence of the plaintiff has been held to "relieve it of the opprobrium of an impertinent intruder when it went into the local courts", *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, at 519 (1934, per Cardozo, J.). Residence, "even though not controlling, is a fact of high significance"; *ibid.*, p. 520. And where the defendant "brought its property into that state, not fortuitiously or by a rare accident but in furtherance of a systematic course of business", it "subjected itself to suit * * * at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else. Such a suit may be a burden, but oppressive or unreasonable it is not"; *ibid.*, pp. 520-1. Nor is jurisdiction lost "because the chief witnesses on the trial reside in other states";

> "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative convenience of the parties".
>
> *International Milling Co.* v. *Columbia T. Co.*, *supra*, 292 U. S., at 521.

Accord:

Canadian Pacific R. Co. v. *Sullivan*, 126 F. 2d 433, at 437-440 (C. C. A. 1, 1942), cert. den. 316 U. S. 696;

Hirliman v. *Southern Pac. Co.*, 268 App. Div. 192 (1st Dept., 1944).

This language certainly sheds strong light upon the meaning of "vexatious or oppressive"; and there is nothing in the *Williams* case to detract from it (see *supra*, pp. 10, 16). The present petitioner, like that in the *International Milling* case, *supra*, is a resident of the forum. Respondent is doing business in the state of the forum to an extent greater than was the defendant in the *International Milling* case. In the face of these strong contacts with New York, the burden of bringing witnesses and records to New York is reduced to a mere inconvenience to which respondent must submit.

In admiralty, likewise, discretion to decline jurisdiction will not be exercised where the suit is brought by a resident; for such power exists only "in suits in admiralty between foreigners", *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, *supra*, 285 U. S., at 421. Such also is the law of England, *supra*, pp. 12-13. And even under Scottish law the doctrine of *forum non conveniens* has been held applicable only where the chosen forum "is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties • • •", *Société du Gaz de Paris* v. *"Les Armateurs Francais"*, *supra*, (1926) Sess. Cas., at 206. A forum in which one of the parties resides thus is clearly a "natural or proper forum".

We submit, therefore, that a suit brought in good faith in the district of the plaintiff's residence is not vexatious or oppressive.

POINT III

Even if the venue statute were held not to give petitioner an absolute right to sue in New York, the District Court was bound by New York law to accept jurisdiction.

Assuming, for argument, that Section 51 of the Judicial Code does not give petitioner an absolute right to sue in the district of his residence, the question remains whether the District Court's power—or lack of power—to decline jurisdiction is not governed by the law of New York, the state in which the District Court is sitting.

Had this action been brought in the state courts of New York, jurisdiction would have been mandatory and petitioner could not have been relegated to suit in Illinois. That such is the law of New York with respect to stockholders' derivative actions is plain under the authorities; *Miller* v. *Quincy*, 179 N. Y. 294 (1904); *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (2nd Dept., 1899); *Goldstein* v. *Lightner*, 266 App. Div. 357 (1st Dept., 1943), aff'd 292 N. Y. 670. The Circuit Court so found (R. 44-45, n. 2); and it held that there is "no valid distinction between a stockholders' and a policyholders' derivative suit seeking relief of this character" (R. 45).

We submit that this New York rule, whether it be deemed substantive or procedural in character, binds the District Court.

If the rule be thought substantive—see *Weiss* v. *Routh*, 149 F. 2d 193, at 195 (C. C. A. 2, 1945)—it binds the District Court under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

If the rule be thought procedural—see *Gilbert* v. *Gulf Oil Co.*, *supra*, 153 F. 2d, at 885—it is no less binding. This follows from Rule 45 of the Civil Rules of the District Court for Eastern New York (similar to the rules of other District Courts) which provides:

> "Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Federal Rules of Civil Procedure, or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States, or in default thereof the procedure which shall then prevail in the Supreme Court of the State of New York shall be applied."

No statute of the United States and no provision of the Federal Rules of Civil Procedure confers upon the District Court discretion to decline jurisdiction once the statutory requirements of venue are met. Nor does "the procedure heretofore prevailing in courts of equity of the United States" support such power; on the contrary, the New York practice relating to discretionary jurisdiction has heretofore been considered as binding in the federal courts; *Summerall* v. *United Fruit Co.*, 80 F. 2d 1020 (C. C. A. 2, 1936), aff'g 11 F. Supp. 963 (D. C., S. D. N. Y., 1935); *Panstwowe Zaklady Graviozne* v. *Automobile Ins. Co. of Hartford*, 36 F. 2d 504 (D. C., S. D. N. Y., 1928). But even if these precedents should not be deemed conclusive, the last part of Rule 45, *supra*, directs application of the local law of procedure. Under that law jurisdiction is mandatory.

Dated, June 12, 1946.

Respectfully submitted,

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